
NO. 4504

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit 14

BOOTH FISHERIES COMPANY, a cor-
poration,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE DIS-
TRICT OF ALASKA, DIVISION NUM-
BER ONE, AT JUNEAU.

BRIEF FOR PLAINTIFF IN ERROR

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JUNEAU, ALASKA

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STATEMENT.

Defendant was informed against by the United States Attorney at Juneau, Alaska, by two informations filed in the District Court at Juneau for alleged violation of the Act of Congress, approved June 6, 1924, 43 Stat. L. page 464 locally known as the White Bill, which was an amendment to the Act of Congress of June 26, 1906. The first

information is No. 1749B and charges a violation of Section 4 of the White Act of June 6, 1924, alleging that defendant fished for salmon for commercial purposes by means of a fish trap within five hundred yards of the mouth of a small creek at or near Lucky Cove, Alaska, continuously from July 26th to August 20th, 1924. The second information is No. 1778B and charges the defendant with having unlawfully erected and maintained a floating fish trap within five hundred yards of the mouth of same stream on July 25th, 1924. There were two other counts in information No. 1778B but these were dismissed by the Court. For the purpose of the trial the two informations were consolidated.

The sections of the White Act approved June 6th, 1924, under which these prosecutions were brought read as follows:

“Sec. 3. Section 3 of the Act of Congress entitled “An Act for the protection and regulation of the fisheries of Alaska,” approved June 26, 1906, is amended to read as follows:

‘Sec. 3. That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish wheel, or other fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than one thousand feet, or within five hundred yards of the mouth of any creek, stream, or river into which salmon run, excepting the Karluk and Ugashik Rivers, with the purpose or result of capturing salmon or preventing or

impeding their ascent to the spawning grounds, and the Secretary of Commerce is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed. For the purposes of this section, the mouth of such creek, stream, or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net, or other fishing appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or to construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance.'

Sec. 4. Section 4 of said Act of Congress approved June 26, 1906 is amended to read as follows:

'Sec. 4. That it shall be unlawful to fish for, take or kill any salmon of any species or by any means except by hand rod, spear, or gaff in any of the creeks, streams or rivers of Alaska; or within five hundred yards of the mouth of any such creek, stream, or river over which the United States has jurisdiction, exception the Karluk and Ugashik Rivers: Provided, That nothing contained herein shall prevent the taking of fish for local food requirements or for use as dog feed.'

The Defendant was convicted and sued out this Writ of Error to the District Court to review the judgment of that Court. The questions arising relate to the refusal of the Trial Court to give instructions requested by the Defendant to the effect

that the law required that the Secretary of Commerce should determine and mark the mouth of the stream in question; and that it was necessary to prove that the creek in question was a salmon stream between July 3rd and August 20th, 1924; and to the Court's instruction giving the definition of the mouth of a stream; and upon the necessity for the placing of markers in the mouths of salmon streams.

ASSIGNMENTS OF ERROR.

The record contains eight assignments of error, appearing on pages 171 to 175 thereof, and they are to the admission of certain testimony on the part of the Government, objected to by defendant, and the giving of said instructions by the Trial Court, excepted to by defendant and the refusal to give certain instructions requested by the defendant in writing, and the overruling defendant's motion for a new trial and to the rejection by the Court of certain evidence offered by the defendant. These assignments of error are as follows:

I.

"The District Court erred in overruling the objection of the defendant to the question propounded to the witness, Iver N. Stensland, by the United States Attorney, as follows:—

"Now what was the effect of this trap being in this position with reference to salmon approaching the stream."

II.

The District Court erred in sustaining the objection to the question propounded by defendant's counsel to the witness, Iver Thue, as follows:—

“Did you see at any of those times any seine fishermen fishing between the trap and the mouth of the creek.”

III.

The District Court erred in giving Instruction No. VII. to the Jury, which reads as follows:

“To this end, I charge you that the mouth of a stream emptying into tidewater, is the point or place where the waters of the stream meet tidewater at mean low tide. It is not where the waters of the stream meet tide water at high tide, but where the waters of the stream meet tidewater at mean—that is, the average—low tide.”

IV.

The Court erred in giving Instruction No. XI. to the Jury, which is as follows:

“A further question is whether there were any markers on that creek. I charge you that this is not material as to either of these informations. That clause in Section 3 reading, ‘For the purposes of this section, the mouth of such creek, stream or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination.’ is only for the purpose of fixing the mouth of the creek when and as determined by the Secretary of Commerce. The testimony herein shows that the

Secretary of Commerce has not fixed the mouth of the creek nor marked it, in which event it becomes a question of fact to as where the mouth of the creek is, to be determined by the jury in each particular case from the evidence and from the instructions given them by the court. If, however, the Secretary of Commerce should determine where the mouth of the creek is and should mark it, then the court would be bound by it; but, not having done so, the court is not bound by it."

V.

The District Court erred in giving Instruction No. XII. which reads as follows:

"Now, as to the question of notice to the defendant, that is not a material question in this case. Each offense in this case is what in law is called a *malum prohibitum*. The question of the good faith of the defendant does not arise in this case at all. The law provides that the defendant shall do certain things and the defendant is supposed to have notice of what the law provides. He is presumed to know the law, and where an act is prohibited which is not in itself immoral or wrong, it is termed a *malum prohibitum* and the defendant must do as the law required him to do, whether his intention was to violate the law or not."

VI.

The Court erred in refusing to give instruction No. II. requested by the defendant, which instruction reads as follows:

"You are instructed that Section 3 of the Act of Congress of June 6, 1924, under which

this prosecution is brought, provides as follows:

“Section 3. That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish wheel, or other fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than one thousand feet, or within five hundred yards of the mouth of any creek, stream, or river into which salmon run, excepting the Karluk and Ugashik rivers, with the purpose or result of capturing salmon or preventing or impeding their ascent to the spawning grounds, and the Secretary of Commerce is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed. For the purposes of this section, the mouth of such creek, stream or river shall be taken to be the point determined as such by the Secretary of Commerce and marked in accordance with this determination. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net, or other fishing appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or to construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance.’

“You are instructed that in this case, unless it has been shown that the Secretary of Commerce, or some one under his direction, determined and marked the point designated as the mouth of the stream in question, you must find the defendant not guilty.”

VII.

The Court erred in refusing to give to the jury Instruction No. III. requested by the defendant, which instruction reads as follows:

“You are instructed that in order to find the defendant guilty, it is necessary for the government to prove that the stream in question was a stream or creek into which salmon ran prior to August 20, 1924; and if the government has not proved that salmon ran into this stream, or, in other words, that this was a creek into which salmon ran between the 3rd day of July and the 20th day of August, 1924, your verdict must be not guilty.”

VIII.

The Court erred in overruling the defendant's motion for a new trial.

POINTS, ARUGMENT AND AUTHORITIES.

The assignments of error present to this Court for determination the following questions, namely:

First.

Was it error for the Trial Court to instruct the Jury as in instruction No. VII. which defined as a matter of law the mouth of a stream emptying into tidewater as set forth in assignment No. 3? (Tr. page 172).

Second.

Was it error for the Court to instruct the Jury as in instruction No. XI., in which the Court stated

that it was not material whether markers were placed on the Creek; and the mouth of the Creek determined and marked by the Secretary of Commerce? (Assignment No. 4 and 6, Tr. Page 172-3-4).

These two questions will be presented in the order hereinabove set forth.

I.

WAS IT ERROR FOR THE TRIAL COURT TO INSTRUCT THE JURY AS IN INSTRUCTION NO. VII. WHICH DEFINED AS A MATTER OF LAW THE MOUTH OF A STREAM EMPTYING INTO TIDEWATER?

The Act of June 6, 1924, known as the White Act, under which this prosecution is brought is entitled "An act for the protection of the fisheries of Alaska and for other purposes"; and sections 3 and 4 of this act of June 6, 1924, are simply amendments of Sections 3 and 4 of the Act of June 26, 1906. The evidence shows that the defendant maintained a floating fish trap at a certain point in Lucky Cove for at least eight years. The two informations together, which were consolidated at the trial, charged first that the company violated Section 4 of the White Act by fishing for salmon within five hundred yards of the mouth of the creek; and, secondly, that it maintained a fish trap within five hundred yards of the mouth of the same creek. The fishing alleged to have been done

in information No. 1749B was done by means of the same trap mentioned in information 1778B and alleged to have been maintained within five hundred yards of the mouth of the creek. The same acts which are relied upon to support allegations in one information are also relied upon to support the allegations in the other. In other words, it is contended that the same act constitutes two crimes.

It is our contention that Section 3 of the White Act was intended to apply to *fish traps* and that Section 4 was intended to apply to *other means of fishing* within the prohibited distance from the mouth of a creek, stream or river. In this case the evidence shows that the company was fishing by means of a floating fish trap at Lucky Cove, and by no other means.

The Court instructed the Jury that "the mouth of a stream emptying into tidewater is the point or place where the water of the stream meets tidewater at mean low tide." In determining whether this instruction was proper a comparison of Section 3 of the law of June 26, 1906 with Section 3 of the law of June 6, 1924 will be instructive. Section 3 of the old law of June 26, 1906 reads as follows:

"That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish wheel or other fixed or stationary obstruction except for the purposes of fish culture, in any

of the waters of Alaska, at any point where the distance from shore to shore is less than five hundred feet, or within five hundred yards of the mouth of any red salmon stream where the same is less than five hundred feet in width, with the purpose or result of capturing salmon or preventing or impeding their ascent to their spawning grounds, and the Secretary of Commerce is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed."

Section 3 of the White Act of June 6, 1924 is simply an amendment of the above quoted section of the old act, and reads as follows:

"That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish wheel, or other fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than one thousand feet, or within five hundred yards of the mouth of any creek, stream, or river into which salmon run, excepting the Karluk and Ugashik Rivers, with the purpose or result of capturing salmon or preventing or impeding their ascent to the spawning grounds, and the Secretary of Commerce is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed. For the purpose of this section, the mouth of such creek, stream, or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net, or other fishing appliance which is being or which has been laid or set in any

of the waters of Alaska, or to drive or to construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance.”

It will be observed that under the old law no attempt was made to define the mouth of a creek, stream or river, and it is a mixed question of law and of fact. There are many rivers, creeks and streams flowing into the tidewaters of the Coast of Alaska, from a river of the size of the Yukon down to the unnamed creek at Lucky Cove, and no broad definition could be given which would define the mouths of all streams and rivers and be applicable alike to small creeks and rivulets and to large rivers. It seems that this is apparent from the fact that Congress in amending the old law of 1906 saw fit to insert in the new law the provision which defines the mouth of a creek, stream or river as the “point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination.” If the Court’s instructions were correct there would be no occasion for this provision in the White Act for if the mouth of a stream could be determined as a matter of law why then should the Secretary be authorized to determine the mouth and to mark it in accordance with his determination?

As a matter of fact much difficulty has been heretofore experienced in determining just what constitutes the mouth of a stream and this provision

was inserted in the Act of June 6, 1924 in order to settle the matter and in order to fix as a matter of law the point which constituted the mouth of a stream. This is borne out by the testimony of Mr. Ball, the Assistant Fish Commissioner and the chief prosecuting witness, in answer to questions as follows:

Q: "Now Mr. Ball you had some— * * * and there has been some little difficulty about determining the mouth of a stream, hasn't there?"

A: "In some places it has been very hard to determine."

Q: "Now was the mouth of this stream marked at any time?"

A: "Not that I know of." (Tr. p. 37).

It is a fact that there are many streams which empty into the tide waters where a trap could be constructed which would be fifteen hundred feet from the mouth of the stream at mean low tide as defined by the Court here, but which would be perhaps less than twelve hundred feet from the actual mouth of the stream at half tide, and I do not think it could be for one moment contended that in such a situation the Bureau of Fisheries would permit a trap to be maintained in the face of the provisions of Section 3 of the White Act. For instance, if a stream flowed out to the beach in a straight line in the direction of a fish trap and came down several hundred feet on the beach

and to a point within a few hundred feet of the trap and then suddenly turned sharply at an angle, flowing away from the trap so that the point at which the waters of the stream emptied into the tide waters at mean low tide would be more than fifteen hundred feet distant from the trap, it could hardly be conceived that the Secretary of Commerce could not and would under Section 3 of the White Act, determine the mouth of the stream to be at that point where the stream came nearest to the trap on the beach; and indeed it would be defeating the purpose of the law to construe it otherwise; for the act is for the protection and regulation of fisheries, and it is a well known fact that most fish which enter salmon streams and particularly small streams, enter at high tide and not at low tide. However, if the Court's definition of the mouth of a stream is correct, under such a situation as we have described, the fish would be protected from the trap at low water when the protection was not required and they would be getting the least protection at half tide or high tide when the protection was needed. That it must have been with these considerations in view and knowing that as a matter of fact it was very hard to determine the mouth of some streams that Congress enacted the provision in Section 3 of the White Act defining the mouth of a stream to be the point determined and marked by the Secretary of Commerce, is apparent.

It seems to me that we cannot reconcile the instruction of the Court, defining the mouth of the stream as a matter of law with the law itself, which leaves that definition to the Secretary of Commerce.

As stated before the White Act of June 6, 1924 is not an entirely new law but only an amendment to the existing law; and in interpreting its provisions the old law and the amendment should be considered together.

“In the construction of amendments to statutes, the body enacting the amendment will be presumed to have had in mind existing statutory provision and the judicial construction touching the subject dealt with. The amendment and the original statute are to be read together in seeking to discover the legislative will and purpose and if they are fairly susceptible of two constructions, one of which gives effect to the amendatory act, while the other will defeat it, the former construction should be adopted.” (25 R. C. L. page 1067, Section 291).

In this case if the trial court's definition of the mouth of a stream is correct, the provision in Section 3 of the White Act, that the mouth shall be taken to be the point determined and marked by the Secretary, is of no force nor effect; and the Court instead of giving effect to the amendatory act will be disregarding the amendment. It is elementary that in the construction or interpretation of a statute the first consideration is to determine the

intent of the legislature. In this case, it was clearly not the intent of the legislaure to fix the mouth of a stream in all cases as the point where the waters of the stream meet the tidewaters at mean low tide.

“It is well settled that in construing any statute all the language shall be considered and such interpretation placed upon any word or phrase appearing therein as was within the manifest intent of the body which enacted the law.” (25 R. C. L. p. 988 Sec. 234.)

“It is a familiar rule in the construction of terms to apply to them the meaning naturally attached to them from their context. Noscitur a Sociis is a rule of construction applicable to all written instruments and statutes. Where any particular word is obscure or of doubtful meaning taken by itself, its obscurity or doubt may be removed by reference to associated words.” (25 R. C. L. p. 995, Section 239).

It is safe to assume that Congress placed the provision for marking the mouths of streams in the White Act for the very reason given by Mr. Ball when he stated, as hereinabove quoted “*it was very hard to determine the mouth of a stream in some places,*” and it is only common sense to assume that this question had resulted in considerable confusion and uncertainly under the law before it was amended.

Testimony of E. M. Ball, (Tr. pp. 37-38) shows that the Bureau officials had measured the distance

from this trap in question to what was considered the mouth of the stream in 1923 and found it to be 1590 feet. The following questions were asked Mr. Ball:

Q: "Well, you know whether your Bureau officials had inspected the trap."

A: "Yes, the trap was examined several times in 1923."

Q: "Now was the distance measured before by the Bureau?"

A: "I think Mr. Stensland made one measurement in 1923."

Q: "Do you know the result?"

A: "At high water."

Q: "Do you know the result of that?"

A: "1506 feet I think het old me."

Q: "1506 feet?"

A: "Yes."

(Tr. pp. 37-38).

The answer 1506 feet was apparently an inadvertence; for the sketch introduced in evidence by the prosecution, as plaintiff's exhibit No. 3, shows this distance to be 1590 feet and Mr. Ball's answer to a question by Mr. Shoup, using the exhibit No. 3 for illustration was "along this direction to the same point was 1590 feet." (Tr. p. 30). In this testimony it is true that Mr. Ball uses the word high water mark; and this may have referred to periods of freshets in the creek although the wit-

ness did not state what he meant by high water mark, nor did he state whether the distance would have been less than 1590 feet at this point at low water mark on the creek.

In answer to a question by the District Attorney the witness, Stensland, a fish warden testified as follows:

Q: "Did you make any other measurements?"

A: "I made measurements there last year the first time I was in there."

(Tr. p. 68).

Mr. Stensland did not say what those measurements were but it is safe to assume it must have shown the distance to be more than fifteen hundred feet or the trap would not have been permitted to continue fishing; and if it were less than 1500 feet he would have so testified.

It is therefore plain that the Bureau officials acting under the Secretary of Commerce had measured the distance from the trap to what they considered and established the mouth of the stream in 1923 and found the distance to be 1590 feet. The testimony shows the trap to have been in exactly the same place each year (Testimony of Iver Thue, Tr. p. 105; testimony of A. A. McCue, Tr. p. 107). In fact, the Bureau officials conceded that the trap was in the same spot each year.

The Secretary of Commerce, therefore, and those acting under him, placed a certain construc-

tion upon the statute and determined what they considered the mouth of the stream in 1923, and they found the trap to be more than five hundred yards from the mouth of the stream.

“The construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest officer in the executive department of the Government or has been observed and acted upon for many years and such construction should not be disregarded or overturned unless it is clearly erroneous.” (*U. S. vs. Finnell*, 185 U. S. p. 236; *U. S. vs. Johnstone*, 124 U. S. p. 236).

This rule is particularly applicable to this case for the old law of 1906 prohibited fish traps within five hundred yards of the mouth of a stream in almost the identical language of the amended White law of 1924 and the Bureau had evidently determined the mouth of the stream in question to be at the point where Mr. Ball said it measured 1590 feet; and as shown on the exhibit.

It is quite apparent that the officials of the Bureau considered the mouth of the stream to be at the point where the distance is shown to be 1590 feet, for Mr. Ball stated that after his measurements were made in 1924 he had talked to the General Manager of the company the night they made the new measurements and did not at any time notify him to remove the trap. (Tr. p. 36). It is therefore safe to assume that they decided to

change the point which they had considered the mouth of the stream afterward, and they made this decision without any notice to the defendant. Ordinarily no notice would be required but under the wording of this statute, which provides that for the purpose of Section 3 the mouth of the creek shall be taken to be the point determined to be such mouth by the Secretary of Commerce and marked, etc., we contend that the Bureau officials should have placed a marker at the new point determined by them to be the mouth of the stream in 1924. They had already established the point in 1923 and having changed it in 1924 after the White Law was enacted and in effect it was their duty to place a marker at the new point determined by them in 1924.

As further proof that the Bureau officials considered the point marked upon Exhibit 3 as being 1590 feet from the trap, as the mouth of the stream, we have the testimony of Mr. Stensland, in which he states he found fish in the stream in September 1923; and if this is true, he knew it was a fish stream at that time and yet he was at the trap five times during the fishing season of 1924 and at all of these times the trap was fishing and he did not order the trap closed nor complain about it nor interfere with it. This clearly indicates that the Bureau had established the mouth of the stream in 1923 at the point mentioned, which was 1590 feet from the trap. Mr. Stensland further

testified in answer to a question by the District Attorney, as follows:

Q. "Now point out on that map the meander line of low tide; that is, mean low tide."

A. "The meander line of mean low tide is this shaded line—this line outside of the shaded area. *There is a gravel bar there and it goes dry right at the mouth of the stream at mean low tide. * * **" (Tr. p. 66).

The purpose of the law under which this prosecution was brought; and the purpose of both acts herein mentioned was to protect and regulate the fisheries of Alaska and if Mr. Stensland knew in 1923 that the stream in question was a salmon stream and that the trap was within the prohibited distance, and if Mr. Ball knew on July 26, 1924 that the trap was within the prohibited distance of the stream, it would have been their duty to have seized the trap and to have prosecuted the owner. They did not do this, however, for the reasons herein stated that the trap was not within five hundred yards of what had been then established as the mouth of the stream. It is plain from the evidence that the officials of the Bureau *suddenly decided to change the point which they considered the mouth of the stream* and they did this without marking the point or without notifying the defendant of their decision; and permitted the defendant to continue to fish until August 19, 1924 in reliance upon the fact that the mouth of the

stream was at the point which Mr. Stensland had measured in 1923 and which was 1590 feet distant from the trap.

Instructions Nos. VII. and XI. are inconsistent for in instruction No. VII. the Court defined the mouth of a stream as *a matter of law*. In instruction XI. the Court instructed in effect that where the Secretary of Commerce had not fixed the mouth of a creek nor marked it, it became a *question of fact* as to where the mouth was. (Tr. pp. 140-143).

It seems very clear that Congress did not intend that the point which should be marked by the Secretary of Commerce and which should be considered the mouth of a stream in all cases should be the point where the waters of the stream meet the tidewaters at mean low tide. There are many places in Alaska, as elsewhere, where streams come down to the tidewaters and spread out on the beach into several channels. Part of the waters of the stream meet tidewaters at one point and part at another point; and some of the channels of the stream might be sufficient for fish to enter the stream at the mouth at mean low tide and some of them may be insufficient. This is often the case, and the plain intent of Congress seems to have been to leave the whole matter to the discretion of the Secretary of Commerce, acting of course, through the Bureau of Fisheries, to mark what-

ever point or points he considered would best protect the fish.

It would be absurd to assume that in the illustration we have given where a portion of a creek flowing over the tide flats would be much nearer to a fish trap than fifteen hundred feet, but where nevertheless the creek would take a turn before actually entering the tidewater at mean low tide, so that its actual mouth at mean low tide would be more than fifteen hundred feet distant from the trap, that the Secretary of Commerce, under this law, would not have the power to determine and fix the mouth of the stream at the point nearest the fish trap, although it might be several hundred feet from the actual point where the waters of the stream meet the tidewaters at mean low tide. In fact, it would be the Secretary's duty to mark the mouth as the point nearest the trap, for by so doing he would be protecting the fish, and in marking it at the actual point where the creek waters meet the tidewaters, he would be affording the fish no protection, and would be defeating the purpose of the law.

II.

WAS IT ERROR FOR THE COURT TO INSTRUCT THE JURY, AS IN INSTRUCTION XI., IN WHICH THE COURT STATED THAT IT WAS NOT MATERIAL WHETHER MARKERS WERE PLACED ON THE CREEK AND THE

MOUTH DETERMINED AND MARKED BY THE SECRETARY OF COMMERCE?

The facts to be determined in considering this question are necessarily interwoven with the facts upon which depended the consideration of the first question.

The Court instructed the Jury, in Instruction No. XI., that it was not material whether there were any markers placed in the mouth of the creek; and that it became a question of fact as to where the mouth of the creek was, etc. The Court stated,

“If, however, the Secretary of Commerce should determine where the mouth of the creek is and should mark it, then the Court would be bound by it; but not having done so, the Court is not bound by it.” (Instruction No. XI. Tr. p. 143).

As stated, in considering the first question, the testimony shows that the Bureau officials, acting under the Secretary of Commerce, had determined the mouth of the stream in 1923 and had found the distance from the trap to be 1590 feet. *They then changed the point* to which they measured from the trap, on July 26, 1924, and found the distance to be less than fifteen hundred feet, *but they did not mark the new point* designated by them in 1924, nor did they notify the defendant, who for many years had maintained the trap at the same point, and who was permitted to

continue to maintain the trap until the close of the fishing season of 1924. The record shows that this information was not filed until October 16, 1924, which was almost two months after the close of fishing at Lucky Cove.

If the Bureau officials had never measured the distance from the trap to the stream; had never established any measurements, nor any point as being the mouth of the stream in 1923; or if they had measured the distance to the new point in 1924 and the defendant had afterward installed the fish trap, there might be some merit in the contention that since the Secretary had not determined the mouth of the stream, the defendant erected and installed the fish trap at its peril and was not warranted in expecting to find any marker at the mouth of the stream; but the testimony shows that the mouth of the stream had been established in 1923; and that the Secretary in 1924 determined upon a new point and did not either mark the new point, nor notify the defendant of its location. The law does not give the Secretary the power nor authority nor does it direct him to determine the mouth of a stream and keep it secret, but the law directs the Secretary to "*determine and mark*" the mouth of the stream, and where he has once determined it, he is bound to mark it in accordance with his determination.

The Court instructed the Jury in Instruction XI. that if the Secretary had not determined nor

marked the mouth of the creek the Court would not be bound by it; and the Court said that "the testimony herein shows that the Secretary of Commerce had not fixed the mouth of the creek nor marked it, Etc." This statement is not in accordance with the evidence, for the testimony shows that the Secretary had determined and fixed the mouth of the creek but had not marked it. (Testimony of Ball, Tr. p. 37).

As stated before, the reason for the provision in the act of June 6, 1924 authorizing and directing the Secretary to determine and mark the mouths of streams was because there had been great difficulty experienced under the law in determining the point which should be considered the mouth of a stream. The reason for inserting this provision in the law, as amended, was to do away with the confusion and uncertainty which had heretofore existed, and to make it the duty of the Secretary to definitely determine the mouth of each salmon stream in the vicinity of which fishing was carried on. The law is an act for the protection of the fisheries of Alaska and its purpose was to protect and perpetuate the fishing industry and to definitely settle, as far as possible, all fishing rights.

This provision in the act of June 6, 1924 for the determination and marking of the mouths of streams is mandatory; and the mouth of the stream should have been both determined and marked by

the Secretary after the measurements were taken in 1924; for the Act made it the duty of the Secretary to both determine and mark the mouth of the stream and surely it was his duty to mark it after he had determined it. The law reads: "For the purpose of this section, etc." Now the purpose of the section was to determine the mouth of the stream and to prevent fishing within the prohibited area and to warn and inform all trap owners and fishermen to keep their traps and gear outside the prohibited area.

"Whether a particular statute is mandatory or directory does not depend upon its form but upon the intention of the legislature, to be ascertained from a consideration of the entire act, its nature, its object and the consequences that would result from construing it one way or the other." (36 Cyc. p. 1157).

"Such expressions as 'authorized and empowered' and 'shall have power' are to be construed as mandatory or permissive, in accordance with the legislative intent manifest in the particular act." (36 Cyc. p. 1161).

In this case it can hardly be contended that the language of the statute, defining the mouth of the stream to be the point determined and marked by the Secretary of Commerce, was mere idle words, or left the matter to the discretion of the Secretary. It is an express direction and command to the Secretary to determine and mark the actual mouth of each salmon stream, or the point considered to be the mouth for the purpose of Sec-

tion 3 of the act; that is the point where the fish will be best protected by keeping all fishing and fishing appliances fifteen hundred feet distant. This provision was surely inserted in the act for the protection of the fisheries and for a definite purpose; and even if it could for a moment be contended that it is merely directory and to be exercised by the Secretary and the Bureau officials only where they see fit, it cannot be contended that if they exercise the discretion given them to *determine* the mouth of a stream, they can at the same time refuse or fail to *mark the point* so determined, or even to notify those who have, in good faith, been fishing within fifteen hundred feet of the point so determined, with the full sanction of the Secretary.

This is a penal statute and Section 6 provides that any person or corporation violating any of the provisions of Section 3, shall be punished by a very heavy fine and the forfeiture of all fishing appliances, gear and fish taken in violation of the law. It has long been the well settled rule that penal statutes are subject to the rule of strict construction. Examination of the record in this case will show that the defendant was acting in the utmost good faith; that it had maintained its trap at the point where it was in 1924 for eight years, with the sanction of the officials of the Department of Commerce, who had previously examined

the trap and measured the distance to the stream; and one of whom, if his testimony is true, knew in 1923 that there were some fish in the stream, but who nevertheless saw the trap in full operation five times at least during the fishing season of 1924, but who nevertheless gave the company no warning, placed no markers at any point on the stream and did not notify them as to what was considered the actual distance from the trap to the mouth of the stream in 1924; nor did he seize the trap nor complain against the company. Notwithstanding this, two months after the trap ceased fishing and had been removed, complaints were filed against the defendant in the District Court at Juneau, several hundred miles from the scene and at a time when defendant's main witnesses had left the country and could not be found. Testimony A. A. McCue, Tr. p. 108).

The law is designed to protect fish and to regulate the great fishing industry of the Territory of Alaska and it is not designed to entrap those engaged in the fishing industry, like the laws of Caligula, which were written in small characters and placed upon high poles so that they could not be read, in order that the people might be ensnared. The law was not enacted to protect the lives of all fish and to preserve them alive in the water at all times, but it was enacted to insure the supply of fish for food and to perpetuate the industry of

catching and canning fish for food; and to protect the fish supply for this purpose. It was not the purpose of Congress to protect and preserve the lives of the fish so that they might continue to swim in the streams and the sea, but to protect the industry of getting fishing as a source of food supply and to preserve the fish only for the purpose of obtaining them as food. The law should be interpreted in this light and not in a manner which would permit the Bureau officials to encourage a person or corporation to continue a violation of the law, in order that the Bureau might secure a conviction and subject the violator to a fine. By marking the mouth of the stream and notifying the defendant on July 26, 1924 that its trap was within the prohibited distance, as then determined by the Secretary of Commerce, the result would have been to protect the fish and carry out the manifest intent of the statute. By failing to place the marker at the determined point and by failing to notify the defendant of the Secretary's determination, the result has been a large fine imposed upon the defendant, but the intended purpose of the law has not been carried out nor have its mandates been obeyed by the enforcing officers.

We believed that the decision of the lower Court is wrong and that under the instructions, the Jury was left no discretion to determine the questions of fact involved in the case; and that the

Court placed the wrong interpretation upon Sections 3 and 4 of the White Act.

Dated at Juneau, Alaska, April 9th, 1925.

Respectfully submitted,

H. L. FAULKNER,

Attorney for Plaintiff in Error.

A P P E N D I X

AN ACT FOR THE PROTECTION OF THE
FISHERIES OF ALASKA, AND
FOR OTHER PURPOSES.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed season during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during

the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: Provided, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. The right herein given to establish fishing areas and to permit limited fishing therein shall not apply to any creek, stream, river, or other bodies of water in which fishing is prohibited by specific provisions of this Act, but the Secretary of Commerce through the creation of such areas and the establishment of closed season may further extend the restrictions and limitations imposed upon fishing by specific provisions of this or any other Act of Congress.

It shall be unlawful to import or bring into the Territory of Alaska, for purposes other than

personal use and not for sale or barter, salmon from waters outside the jurisdiction of the United States taken during any closed period provided for by this Act or regulations made thereunder.

Sec. 2. In all creeks, streams, or rivers, or in any other bodies of water in Alaska, over which the United States has jurisdiction, in which salmon run, and in which now or hereafter there exist racks, gateways, or other means by which the number in a run may be counted or estimated with substantial accuracy, there shall be allowed an escapement of not less than 50 per centum of the total number thereof. In such waters the taking of more than 50 per centum of the run of such fish is hereby prohibited. It is hereby declared to be the intent and policy of Congress that in all waters of Alaska in which salmon run there shall be an escapement of not less than 50 per centum thereof, and if in any year it shall appear to the Secretary of Commerce that the run of fish in any waters has diminished, or is diminishing, there shall be required a correspondingly increased escapement of fish therefrom.

Section 3. Section 3 of the Act of Congress entitled "An Act for the protection and regulation of the fisheries of Alaska," approved June 26, 1906, is amended to read as follows:

"Sec. 3. That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish

wheel, or other fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than one thousand feet, or within five hundred yards of the mouth of any creek, stream, or river into which salmon run, excepting the Karluk and Úgashik Rivers, with the purpose or result of capturing salmon or preventing or impeding their ascent to the spawning grounds, and the Secretary of Commerce is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed. For the purposes of this section, the mouth of such creek, stream, or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net, or other fishing appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or to construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance."

Sec. 4. Section 4 of said Act of Congress approved June 26, 1906 is amended to read as follows:

"Sec. 4. That it shall be unlawful to fish for, take, or kill any salmon of any species or by any

means except by hand rod, spear, or gaff in any of the creeks, streams, or rivers of Alaska; or within five hundred yards of the mouth of any such creek, stream or river over which the United States has jurisdiction, excepting the Karluk and Ugashik Rivers; Provided, That nothing contained herein shall prevent the taking of fish for local food requirements or for use as dog feed."

Sec. 5. Section 5 of said Act of Congress approved June 26, 1906 is amended to read as follows:

"Sec. 5. That it shall be unlawful to fish for, take, or kill any salmon of any species in any manner or by any means except by hand rod, spear, or gaff for personal use and not for sale or barter in any of the waters of Alaska over which the United States has jurisdiction from six o'clock postmeridian of Saturday of each week until six o'clock antemeridian of the Monday following, or during such further closed time as may be declared by authority now or hereafter conferred, but such authority shall not be exercised to prohibit the taking of fish for local food requirements or for use as dog feed. Whenever the Secretary of Commerce shall find that conditions in any fishing area make such action advisable, he may advance twelve hours both the opening and ending time of the minimum thirty-six-hour closed period herein stipulated. Throughout the weekly closed season herein prescribed the gate, mouth,

or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of the webbing or net of the 'heart' of such traps on each side next to the 'pot' shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes."

Sec. 6. Any person, company, corporation, or association violating any provisions of this Act or of said Act of Congress approved June 26, 1906, or of any regulation made under the authority of either, shall, upon conviction thereof, be punished by a fine not exceeding \$5,000 or imprisonment for a term of not more than ninety days in the county jail, or by both such fine and imprisonment; and in case of the violation of Section 3 of said Act approved June 26, 1906, as amended, there may be imposed a further fine not exceeding \$250. for each day the obstruction therein declared unlawful is maintained. Every boat, seine, net, trap, and every other gear and appliance used or employed in violation of this Act or in violation of said Act, approved June 26, 1906, and all fish taken therein or therewith, shall be forfeited to the United States, and shall be seized and sold under the direction of the Court in which the forfeiture is declared, at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of as other fines and forfeitures under the laws relating to Alaska. Proceedings for such

forfeiture shall be in rem under the rules of admiralty.

That for the purposes of this Act all employees of the Bureau of Fisheries, designated by the Commissioner of Fisheries, shall be considered as peace officers and shall have the same powers of arrest of persons and seizure of property for any violation of this Act as have United States marshals or their deputies.

Sec. 7. Sections 6 and 13 of said Act of Congress approved June 26, 1906, are hereby repealed. Such repeal, however, shall not affect any act done or any right accrued or any suit or proceeding had or commenced in any civil cause prior to said repeal, but all liabilities under such laws shall continue and may be enforced in the same manner as if committed, and all penalties, forfeitures, or liabilities incurred prior to taking effect hereof, under any law embraced in, changed, modified, or repealed by this Act, may be prosecuted and punished in the same manner and with the same effect as if this Act had not been passed.

Sec. 8. Nothing in this Act contained, nor any powers herein conferred upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses, nor limit or curtail the powers granted the Territorial Legislature of Alaska by the Act of Congress approved August

24, 1912, "To create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes."

Approved, June 6, 1924.